

University of Groningen

## How Would 'Hammock-Like' Cases Be Dealt with in Seven European Jurisdictions?

Colombi Ciacchi, Aurelia; McCann, Adam; Oldenhuis, Fokko

*Published in:*  
European Review of Private Law

**IMPORTANT NOTE:** You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2014

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Colombi Ciacchi, A., McCann, A., & Oldenhuis, F. (2014). How Would 'Hammock-Like' Cases Be Dealt with in Seven European Jurisdictions? Comparative Observations. *European Review of Private Law*, 22(1), 153-156. <http://www.kluwerlawonline.com.proxy-ub.rug.nl/abstract.php?area=Journals&id=ERPL2014013>

**Copyright**

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

**Take-down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

*Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.*

## How Would ‘*Hammock-Like*’ Cases Be Dealt with in Seven European Jurisdictions? Comparative Observations

ADAM MCCANN, AURELIA COLOMBI CIACCHI & FOKKO T. OLDENHUIS\*

### 1. Reflections

It is no understatement to say that the Dutch *Hammock* case has thrown the contributors of this comparative law project into uncharted territory in their respective jurisdictions. In each country examined, regard must be made to the almost non-existent judicial or academic treatment of such unusual, brain-teasing facts. Can joint possessors hold one another liable in the field of non-contractual liability? Or is such a claim reserved for third parties who are not in any legal relationship with the joint possessors?

In the Netherlands, Article 6:174(1) (*Burgerlijk Wetboek*) BW states that the possessor of a constructed immovable thing, which creates a danger, is liable for the damage that arises. The above article, however, does not specify if such liability is limited to third parties or if it is also extended to joint possessors. The Dutch Supreme Court (*Hoge Raad*) upheld the earlier District Court (*Rechtbank*) decision and stated that Article 6:174 does not limit the possessor’s strict liability to third parties only. It held that the Dutch Parliament had not expressed such a limitation, nor did it matter that the aggrieved joint possessor was related to the other possessor. Essentially, it weighed up the interests of the severely injured woman with the societal impact of allowing for such a claim and the interests of third party insurance. It sought ‘the most just solution’. The severity of the physical injuries sustained did seem to tip the balance, especially given the lack of legislative guidance on the matter.

The aim of this comparative collection is to ascertain how such a claim may be dealt with in other European nations.

### 2. Comparative Summary

#### 2.1. Civil Law Jurisdictions

In Germany, the most applicable liability rule is fault-based (sec. 836 (*Bürgerliches Gesetzbuch*) BGB), with a reversal of proof for both breach of duty

---

\* Adam McCann, Research Fellow at the Groningen Centre for Law and Governance and PhD Candidate for the Endowed Chair Law and Governance at the University of Groningen. Aurelia Colombi Ciacchi, Professor of Law and Governance at the University of Groningen and Academic Director of the Groningen Centre for Law and Governance. Fokko T. Oldenhuis, Professor of Civil Law and Law and Religion at the University of Groningen, The Netherlands.

and causation. If the defendant in question can demonstrate that the relevant duties were observed, s/he may rebut the assumed breach of duty. In the case of co-owners, both are jointly liable for the whole damage caused by their property. German law does not preclude the actionability of a claim by an injured co-owner against the other owner. The reduction of liability in such an instance is probable on the grounds of contributory negligence. However, one must carefully note the widely utilized Terms for Insurance of Statutory Liability Risk [*Allgemeine Versicherungsbedingungen für die Haftpflichtversicherung (AHB)*] and, in particular, rule Number 27. Essentially, this purports that not just the policyholder of third party insurance but also *all owners* of the insured building (in accordance with sec. 836 BGB) are precluded from recovering damages under the policy. Therefore, under widely utilized standard contract terms, if a ‘Hammock-like’ scenario arose in Germany, the plaintiff would not have received damages.

In France, it appears that the most relevant legal provision is Article 1384 Code Civil, which states that one is responsible not only for the damage one causes by his/her own act but also for that caused by the things (including immovable property) that was in his/her custody. This is a rule of strict liability. Liability falls upon the person responsible for the use, management, and control of the thing (in his/her custody) at the exact moment it causes damage – *à l’instant précis où celle-ci a causé un dommage*. When custodianship is shared among several people, i.e., *quand garde soit partagée entre plusieurs personnes*, liability will only be imposed on those who are exercising their custodial power at the *exact time* of the injury. Given the facts of the *Hammock* case, the victim was solely in control of the pillar at the exact time of the accident, thus it may be deemed that the boyfriend could not be found liable. Note also that the severity of the aggrieved injuries would remain largely irrelevant. One may conclude from this that the French courts would not follow the decision made in *Hammock*.

In Belgium, the main legal provision at play is Article 1384 of the Civil Code, which provides that the guardian of defective property is liable for the harm caused by that property’s particular defect. This is a strict liability rule. Indeed, there may be joint or several guardians of the property in question, each of whom is liable to the victim for full compensation. A 1983 Belgian *Cour de cassation* decision, which is somewhat analogous to the *Hammock* case, sheds some light on the potential Belgian solution. Here, it was held that Article 1384 applies to *toutes les victims*, and there is no statutory exclusion of this rule with regard to a victim who is also joint guardian of the property. Similar to the Dutch *Hoge Raad* approach, the Belgian courts have adopted the attitude that it is not for the judiciary to preclude such a claim where the law does not explicitly do so.

In Italy, the most suitable rule appears to be Article 2053 of the Civil Code: *the owner of a building or other immovable construction shall be liable for damages caused by its ruinous state, unless he can show that the event causing the damage was not due to lack of maintenance or a construction defect*. This article is

largely considered to impose strict liability on property owners. In the case of several tortfeasors, all are jointly and severally liable against the victim (Art. 2055 (*Codice civile*) CC). In addition, ordinary rules on contributory negligence (Art. 1227 CC) apply, i.e., compensation is reduced in proportion to the victim's fault. The question of whether it is possible to file an action in tort against the co-owner of the building or immovable good in question (and his/her insurance company) has never been addressed by the judiciary or academics. However, an analogous scenario regarding choses in possession and car-related insurance may cautiously shed some light on the possible 'Italian solution'. Regarding the former scenario, the owner, notwithstanding the fact that he is a custodian of the damaged possession, may recover damages. Regarding the latter scenario, the national courts have held that third-party compulsory vehicle insurance covers damage suffered by spouses who are also co-owners of the vehicle. In short, this may imply that the *Hammock* decision reached by the *Hoge Raad* could also be reached in Italy.

## 2.2. *Common Law Jurisdictions*

In England and Ireland, the laws on non-contractual liability share obvious similarities. However, it is plausible that different conclusions may be reached in the respective islands. In both jurisdictions, the issue would be most likely addressed under fault-based liability rules and, more specifically, the respective statutes covering the liability of occupiers (i.e., the person with some degree of control over the defective immovable property). Here, it is crucial to identify the relationship between the aggrieved party ('the entrant', i.e., either a visitor, a recreational user, or a trespasser) and the occupier. If a sufficient relationship can be identified, then it must be ascertained that the occupier acted unreasonably in allowing the danger to manifest.

As the injured woman, indeed, had permission to be on the premises, she could fall under the definition of a 'visitor' while also being classified as an 'occupier'. In neither jurisdiction has an occupier (acting also as a type of entrant - visitor or otherwise) brought a claim against another occupier before the respective courts. The claimant would need to prove that the statute does not preclude an 'occupier' from also being defined as a 'visitor'. It is here where a divergence in legal solutions may arise.

In Ireland, a visitor (as a type of entrant) is a person who 'enters the premise and *is not the sole occupier*'. This implies that an occupiers' liability is not limited to third parties only. Rather, as held by the *Hoge Raad*, due to the lack of explicit legislation to the contrary, an Irish court may find *joint* occupiers (persons who are not *sole* occupiers) as liable against each other. Irish law apportions liability among multiple occupiers according to their degree of control, meaning the aggrieved party in *Hammock* could, in any case, only claim for 50% of the damages. In England, however, there is no explicit definition of a visitor as a person who is 'not the sole occupier'. Therefore, it is not implied that

an occupier's liability may be extended to joint occupiers, making the aggrieved party's claim more difficult at the first hurdle.

### **3. Final Remarks**

The above contributions evidence the complexity in seven European nations in deciding whether or not joint owners of a defective property can hold each other non-contractually liable. Nonetheless, some cautious conclusions may be drawn. A plaintiff's claim akin to the one in *Hammock* is more likely to succeed under Belgian, Italian, or Irish law than under French, English, or German law. What is certain is that such a claim would ignite a novel debate between legal scholars and practitioners alike in all of these jurisdictions. This is regardless of whether or not the most applicable action would fall within the ambit of strict-based liability or fault-based liability rules. As Fokko Oldenhuis points out, 'it is not astonishing' that the given problem eventually came before the Dutch Supreme Court (*Hoge Raad*). In light of the above reports, if such a scenario arose, it would certainly not be astonishing for the case to also be referred to the respective highest courts. The circumstances of the *Hammock* case expose a legal dilemma that is not unique to the Netherlands.